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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

WESLEY BROCKWAY,

Defendant and Appellant.

B212796

(Los Angeles County  
Super. Ct. No. KA080690)

APPEAL from a judgment of the Superior Court of Los Angeles County.

George Genesta, Judge. Reversed in part; remanded in part; affirmed in part.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Wesley Alan Brockway was convicted, following a jury trial, of one count of attempted murder in violation of Penal Code<sup>1</sup> sections 187 and 664, one count of battery with serious bodily injury in violation of section 243, subdivision (d), and one count of mayhem in violation of section 205. The jury found true the allegations that appellant personally used a deadly weapon in the commission of all three offenses within the meaning of section 12022, subdivision (b)(1), and personally inflicted great bodily injury in the commission of the attempted murder within the meaning of section 12022.7, subdivision (b). Appellant admitted that he had served a prior prison term within the meaning of section 667.5. The trial court sentenced appellant to life in prison with the possibility of parole for the mayhem conviction, plus a one-year enhancement term for the deadly weapon use and a one-year enhancement term for the prior prison term. Sentences for the attempted murder and battery convictions were stayed pursuant to section 654.

Appellant appeals from the judgment of conviction, contending that the prosecutor committed misconduct in cross-examining him on certain topics or in the alternative that the trial court erred in permitting the prosecutor to cross-examine him on those topics. Appellant also contends that his conviction for battery with serious bodily injury is a lesser included offense of mayhem and must be reversed. Respondent contends that this matter must be remanded to permit the trial court to strike or impose the section 667.5 enhancements for the murder and battery convictions. We agree that the conviction for battery must be reversed and the matter remanded for the trial court to strike or impose the section 667.5 enhancement for the murder conviction. We affirm the judgment of conviction in all other respects.

#### Facts

In September 2007, David Gregory lived in a cabin near Mount Baldy Village. He had moved there about eight years earlier. Gregory volunteered to eradicate graffiti,

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

clean up trash, and maintain trails. He was known as "Mountain Man Dave." Gregory was five feet four inches tall and weighed 105 pounds.

Gregory met appellant in about 2002, when appellant and Chad Blakely showed up as Gregory was sitting on his patio. Appellant visited Gregory every few months, sometimes with Chad Blakely and Blakely's friend Ryan Hicks. Appellant's brother Eric Brockway ("Eric") also came occasionally. The men barbequed, drank beer and smoked marijuana during their get-togethers. Beginning in about 2006, appellant sometimes brought a samurai sword with him.

On September 27, 2007, in the early afternoon, appellant, Eric, Blakely and Hicks came to Gregory's cabin for a barbeque. They brought chicken, beer and marijuana. Appellant did not bring his sword. On the way down the trail to the cabin, appellant and Eric spray-painted arrows and the words "To Dave's." Hicks spray-painted his nickname of "Wino," Blakely his nickname of "Tucker," and Eric his nickname of "Frosty."

During the barbeque, Gregory brought out a stack of dirt bike magazines he had been given. He wanted to show Blakely a motorcycle shown in one of the magazines. Mixed in with the dirt bike magazines was a copy of Complex magazine with a photo of the African-American singer Kanye West on the cover. Appellant saw the cover and said, "Is that what you beat off to every night?" Appellant's tone was menacing and confrontational. Appellant had never been hostile to Gregory before. Gregory replied, "Sex, greasy kids stuff. Doesn't compare to throwing a motorcycle into a curve at a hundred miles an hour." That ended the exchange.

The party ended about 4:00 or 4:30 p.m. On the way back to the road, appellant spray-painted numerous derogatory statements about Gregory.

The next morning, September 28, Gregory discovered the graffiti along the trail. It had not been there before the barbeque. The graffiti extended for half a mile. It said: "Fuck you, Dave." "Dog fucker Dave." "Dave's a dog fucker." "Dave bitch ass nigger lover." "Nigger lover Dave." "Dave's a come swallower." "Poor victim Sophie." "F you, Dave." "Dave is a homo." "Dave is gay." "Frosty." There was also graffiti depicting homosexual acts, a swastika, an anarchy symbol, and a marijuana leaf with the

number "4/20." There were arrows pointing to Gregory's cabin with the words, "This way to Dave's cabin." The words "Dave is gay" were painted on the three rocks which faced a public road.

Gregory spent three hours covering the graffiti with paint. The graffiti began to bleed through again the next day. A little of the graffiti remained visible at the time of trial.

On September 29, appellant called Blakely and told him that he had gone back to the trail and seen that Gregory had painted over the graffiti. Appellant sounded angry to Blakely.

On September 30, Hicks went to Blakely's house in Upland. They each had two 40 ounce bottles of beer and a marijuana joint. Appellant, Eric, and Michelle Wolfe came to Blakely's house. Appellant and Eric wanted to go back to Gregory's house. Hicks and Blakely thought that it was a bad idea because of the graffiti.

Appellant drove to buy alcohol, then to his house in Ontario to get his sword, a jug of wine and a pack of firecrackers. Appellant then drove with Eric, Blakely, Hicks, and Wolfe to the parking area near Gregory's cabin. They got out of the car to walk down the trail to Gregory's house. Appellant was carrying his sword.

Cary Mitchell, a local resident and firefighter, drove by and saw appellant's group leaving the parking lot. He believed that appellant was carrying a shotgun case. Mitchell said, "There's no shooting back there. Hunting season's over. We don't need to have any fires." Appellant responded, "Fuck you, faggot. What are you looking at? Mind your own business." Mitchell replied, "This is my business. We don't need to have any fires down here." Mitchell's wife added, "We'll just go ahead and call the authorities." Appellant held up his case and said, "It's not a gun." He also said, "We're going down to see our friend Dave." The Mitchells drove on.

As appellant's group walked down the trail, appellant lit and threw firecrackers. According to Blakely, appellant and Eric said, "Fuck Mountain Man Dave, we'll fuck him up." They were calling Gregory "bad names." According to Wolfe, appellant and Eric showed her graffiti that said, "Dave is a fag," and started laughing.

As the group got closer to the cabin, Eric and Wolfe broke off and went to the top of a hill on the Edison High Trail overlooking the cabin. Hicks went off by himself because he was worried the police were going to come, and there was a warrant out for him. Appellant and Blakely walked down the trail to the cabin.

Gregory heard sound on the trail and went to the door of his cabin. He saw appellant and Blakely standing about 30 feet away. Appellant had his sword. Gregory did not see any food. He had a bad feeling. Appellant came closer to the cabin. Gregory saw movement on the Edison High Trail and said, "Who's that?" Appellant replied, "That's my brother and his girlfriend." Gregory looked up at the trail and appellant struck him in the shoulder with his sword.

Gregory pulled out some pepper spray he carried in his vest and began spraying. It did not stop appellant, who continued slashing back and forth with his sword. Appellant repeatedly screamed, "Why did you do it?" Gregory believed that appellant was referring to covering up the graffiti. Blakely also believed appellant was referring to the graffiti.

One of appellant's blows knocked the pepper spray out of Gregory's hand. Gregory rushed toward appellant, grabbing first the blade and then the hilt. The two men struggled over the sword. Gregory tried to drag appellant to the edge of the patio and throw him off, but could not. Appellant was able to pull the sword back. Gregory ran at appellant and knocked him down. Appellant yelled, "Help me, Chad." Blakely responded, "Stop swinging the sword, Wesley."

Appellant continued his attack. Blakely was in shock, but finally intervened in an attempt to help Gregory. Blakely tried to grab the sword, but got the blade instead of the hilt. He was cut, then cut again when appellant swung the sword around. Blakely went down to the creek to wash off his wounds and stayed there.

Gregory tried to return to the cabin. Eric appeared with a cell phone and asked if he should call for help. When Gregory replied that he should, Eric sprayed him with pepper spray. Eric said to appellant and Blakely, "He's not leaving this mountain alive."

Gregory walked to the creek to rinse off the pepper spray. Eric followed him, sprayed him again and said, "You're not leaving here alive, motherfucker."

Eric turned away. Gregory ran as fast as he could, making it to Mt. Baldy Road before collapsing.

Appellant, Blakely and Eric walked back to the car. Along the way, appellant threw the sword down a ravine. Hicks met up with everyone at the car. As they drove away, appellant kept repeating to Blakely, "Dave had a bat." Blakely had not seen a bat, and believed that appellant was making it up. Appellant had no injuries.

Blakely was bleeding profusely and wanted to go to the hospital. Appellant and Eric tried to talk him out of it because they were worried about attracting police attention. Eventually, they dropped Hicks and Wolfe off at a stop sign and then took Blakely to the hospital.

Neil Casey, who was driving up to Mt. Baldy with children, saw Gregory lying by the side of the road with his bloody hand raised up. Casey stopped to help him. He asked Gregory if he had been in a traffic accident, but Gregory said, "No, it was a sword." Casey tried and failed to call 911 on his cell phone. He flagged down a motorcyclist and asked him to get help from the ranger station. He then flagged down another motorist, who was able to call 911 on his cell phone.

A ranger arrived. Gregory asked the ranger to call Richard Wingate, a friend who was a volunteer fireman with emergency medical and rescue training. When Wingate arrived, Gregory told him that appellant had injured him.

Gregory was moved to the San Antonio Dam for air rescue. The first helicopter had to land due to mechanical failure. Gregory was transferred to a second helicopter and taken to the hospital. Gregory was in Class Three Shock, which meant that he had lost 30 percent of his blood. A 40 percent blood loss is usually fatal. Gregory would have died if the transport time had been longer.

Gregory was treated at the hospital by Dr. Donald Green. Gregory had a left shoulder wound that was six or seven inches deep and went through the muscle, the shoulder, the clavicle and the humeral head. The wound was made by an edged weapon

swung with considerable force from the top downward. Gregory also had deep gashes on his left elbow, forearm, wrist, hand and fingers. His left little finger was severed and his right thumb was nearly severed. These wounds were defensive pattern wounds.

Blakely arrived at the hospital and received stitches in his fingers and arm. Police interviewed him about the attack on Gregory. Blakely told the story that appellant had made up. He claimed that Gregory came out of the cabin yelling and hit appellant with a baseball bat. Blakely lied because he was afraid of appellant.

Appellant also went to the hospital. He was examined by Dr. Nadine Konia. She observed superficial scrapes on his knees. She did not find any bruising on any part of his body. Appellant had a full range of motion. Appellant complained of pain on the back of his head which he said was caused by being hit with a baseball bat. He did not complain of pain in his neck, chest, or eyes. Dr. Konia found no indication that he had been pepper-sprayed.

Appellant was arrested at the hospital. His socks, shorts, and shirt were blood-stained.

The next day, Blakely went to the police station. Detective Richard Busch told Blakely that appellant's and Gregory's injuries were not consistent with Blakely's account of events. Blakely admitted that he had lied. Blakely helped police find the sword which appellant had thrown into a ravine near Gregory's cabin. When police recovered the sword, it was glued into the scabbard with dried blood.

Appellant testified in his own behalf at trial. He claimed that he was very drunk on September 27 and would never have painted the graffiti if sober. He admitted painting all the insults, but denied painting the marijuana leaf, "4/20" or the swastika. He felt horrible afterwards. He denied commenting on the magazine cover of Kanye West. He went the next evening to see if Gregory had covered up the graffiti and felt relieved that it had been covered up. He was not angry when he called Blakely and told him that the graffiti had been covered up.

When appellant and the others decided to go back to Gregory's cabin on September 30, the general understanding was that they would apologize. When appellant

reached the clearing around Gregory's cabin, Gregory was on his porch. Appellant and Blakely sat down on the porch. Gregory asked who was on the High Trail. Appellant replied that Eric and a girlfriend were up there. Gregory put his dog Sophie in the cabin and stayed inside with her for a minute. Appellant thought that this was odd and worried that Gregory might return with a weapon.

When Gregory came back out, he had a baseball bat in his right hand. Gregory asked, "Have I ever told you about my relatives back east?" Then he screamed, "Hillbillies." He was thumping his bat on his thigh. Gregory then screamed, "Fuck you, Wesley. You led them, right to me." Appellant believed that Gregory was referring to the graffiti. Gregory was in a heated rage. He advanced toward appellant and sprayed him in the face with pepper spray. Gregory hit appellant on the left side of his head behind his ear and on his back with the baseball bat. He then dropped the bat and pepper spray and tackled appellant, hitting and choking him. Appellant punched Gregory in the face. He saw Gregory pick up the sword, which had gotten knocked to the ground. Appellant and Gregory struggled over the sword, with appellant's hands on the handle and Gregory's on the blade. Appellant asked Blakely for help. Blakely did not help right away.

At some point, either Gregory or Blakely pulled the sword out of appellant's hand; appellant could not see who due to the pepper spray in his eyes. With his hands now free, appellant wiped his eyes and saw Gregory and Blakely struggling over the sword. Appellant took the sword back from them. Gregory went down to the creek to wash up. Appellant and Blakely did likewise. Appellant never swung the sword at Gregory, did not see any blood on Gregory's arm and had no explanation for how Gregory got cut. Appellant denied telling Detective Busch that he hit Gregory in the shoulder when Gregory charged him with the baseball bat.

Eric came down and asked what happened. Appellant and Eric noticed that Blakely was bleeding a lot. Appellant said, "Let's get the fuck out of here." Eric went over to Gregory and said, "Get your ass to the truck." Eric then told appellant that Gregory was on his way to the car. Appellant, Eric and Blakely started walking to the

car. Appellant threw his sword into a ravine so that it would not be available if there was more fighting at the car.

Appellant testified that he told Dr. Konia that his face was burning. He had a bump behind his ear. He did not know why Dr. Konia did not record those facts.

Eric and Wolfe also testified in appellant's defense. Eric testified that while he was on the High Trail with Wolfe, he heard appellant yell for help. When Eric got to the cabin, Gregory was kneeling by the creek holding his bloody hat. A baseball bat was next to him. Eric did not see a cut on Gregory's shoulder. Eric did see blood on appellant and Blakely. According to Eric, when he asked Gregory if he needed help, Gregory came at him with the baseball bat. Eric then pepper sprayed him. He told Gregory to "get your ass" up to the car so that they could take him to the hospital. Eric, appellant and Blakely then went to the car. In the car, appellant said that Gregory had attacked him with a baseball bat. According to Eric, Blakely confirmed the story.

Wolfe testified that when the group walked down the trail to Gregory's cabin on September 30, Eric and appellant showed her graffiti that read "Dave is a fag." They were laughing. Wolfe and Eric did not go directly down to the cabin. As they walked by themselves, Wolfe heard appellant yell, "Get this guy off me." Eric ran down to the cabin, while Wolfe stayed on the trail. A little later, appellant yelled for Wolfe to come on, and she met up with Eric, appellant and Blakely. Appellant threw his sword over the edge of the trail. He said, "I can't believe he maced me. I can't believe he came out frickin' swinging at me."

Marlies Rendon, appellant's former girlfriend, testified that she went with appellant on the night of September 28 to look for the graffiti appellant had made, but it was all covered up. Appellant was not angry. When appellant called Blakely that night, he appeared to regret the graffiti. On September 30, while at Blakely's house, she heard Blakely say, "Dad, it was an accident. Dave freaked out and I had to help Wesley. I had to help him."

Wade Crowe, a friend of appellant's since 1996 and of Blakely's since 1999, testified that he spoke with Blakely on October 1 and Blakely told him that Gregory had attacked appellant with a baseball bat and mace.

Rod Leveque, a reporter for the Inland Valley Daily Bulletin, testified about an interview he conducted with Gregory on October 9. According to Leveque, Gregory said that he believed that there was going to be a confrontation with appellant, so he pulled out his pepper spray and sprayed appellant's face. Appellant drew his sword and a struggle ensued.

Deputy Geoff Grisso testified that a souvenir bat shown in a photo of Gregory's cabin was not on the downstairs bookcase when he searched the cabin. He did not remember seeing it on the upstairs bookcase.

Detective Busch testified in rebuttal that appellant did not mention being drunk when he discussed why he had painted the graffiti. Appellant admitted that he had struck Gregory one time in the shoulder when appellant was on the ground and Gregory was advancing on him with the baseball bat. Appellant did not know if the bat was wood or aluminum.

## Discussion

### 1. Prosecutorial misconduct

Appellant contends that the prosecutor committed misconduct when he questioned appellant about shooting a Black man with a BB gun and marking a house with swastikas. He further contends that the misconduct violated his federal constitutional rights and requires reversal.

"A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to

persuade either the court or the jury. [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 260, internal quotation and edit marks omitted.)

"It is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist.' [Citations.]" (*People v. Bolden* (2002) 29 Cal.4th 515, 562.)

Appellant contends that the prosecutor knew or should have known that there was no evidence to support his theory that appellant shot a BB gun at a Black man out of racial animosity or that appellant was responsible for swastikas discovered at Cheryl Zydonik's house. He further contends that the prosecutor should have requested an Evidence Code section 402 hearing before asking questions on either topic.

The trial court found that it would have been better if the prosecutor had requested a section 402 hearing before asking a question on the above two topics.<sup>2</sup> We agree that the prosecutor should have raised these two issues in a section 402 hearing. The trial court did not find bad faith on the part of the prosecutor, however, telling the prosecutor, "I'm not questioning your good faith." We also see no bad faith.

a. Shooting incident

The BB shooting incident was part of appellant's vandalism conviction. The prosecutor represented to the court that he was offering the fact of the vandalism conviction for impeachment purposes and would not get into the underlying details unless appellant denied the conviction. Appellant did not deny the conviction.

After questioning appellant about the conviction, the prosecutor questioned appellant about his motives for writing graffiti that said "Dave butt fucks niggers" and asking Dave if he "jerked off" while looking at a magazine with a cover photo of a Black man on it. Appellant denied that he was motivated by racial animosity or animosity

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<sup>2</sup> The trial court stated: "You chose to introduce a statement without first raising it with the court and having a 402 hearing." The court added: "Now, we've had the 402 after the fact." The court also said: "I'm just saying that we had things backwards here."

toward homosexuals. The prosecutor then asked appellant if he ever became violent when he saw a Black person. Appellant denied that he had.

The prosecutor next asked appellant if he recalled shooting at a Black man with a BB gun, in what seems to have been an attempt to impeach appellant on his denial of violence. Before appellant could answer the prosecutor's question, his counsel objected and asked for a sidebar. The prosecutor explained that his theory was appellant specifically targeted a Black man during the shooting. He represented that Toby Meyer and appellant's ex-girlfriend Rachel Zydonik would testify about appellant's racial targeting. The trial court permitted the prosecutor to resume questioning appellant about the shooting.

Later the court held an Evidence Code section 402 hearing on this topic. The prosecutor did not produce Meyer or Rachel Zydonik as witnesses. The reason for this is not clear from the record. The prosecutor did call Detective Surgent as a witness at an Evidence Code section 402 hearing. He testified that the Black man appeared to have been a target of opportunity. He could find no reference in his police report to statements about racial motivation or targeting. The prosecutor's questions on redirect suggest that he believed (erroneously) that Zydonik had told the officer that the Black man was targeted due to race. It seems that the prosecutor's representations about evidence of racial targeting were based on a miscommunication or misunderstanding, rather than bad faith.

The trial court found that absent evidence of racial motivation/targeting, the evidence of the shooting was not admissible and ordered appellant's testimony on the topic stricken.

#### b. Swastika

The prosecutor asked appellant if he had painted a swastika on the trail to the victim's house, and appellant replied that Hicks painted the swastika. The prosecutor asked appellant if he had ever carved or painted a swastika on anybody's property, and

appellant replied that he had not. The prosecutor then asked appellant if he had "done something like that" on Cheryl Zydonik's porch. Appellant replied, "No."

The prosecutor produced Cheryl Zydonik at the Evidence Code section 402 hearing. She testified that appellant was in her home with her daughter in February 2002, and when he left she noticed one swastika carved on a candle and two more on her porch. She also found a circle with an A in the middle carved into her bathroom door. Appellant and Rachel were alone in the house that night.

Appellant's counsel argued that he had only learned about Cheryl Zydonik the day before, and had not had an opportunity to question Rachel about the incident. He disputed Zydonik's testimony that no one else had access to the home during the relevant time.

The trial court found that appellant was entitled to make such an investigation if Cheryl's testimony was admitted, but that further investigation of the incident would be an undue consumption of time on a collateral issue. The court decided to exclude Zydonik's testimony and strike appellant's prior testimony on the matter. The court made no reference to bad faith. There was evidence that appellant did carve the swastikas, and there was no basis to find no bad faith on the part of the prosecutor.

### c. Prejudice

We see no prejudice to appellant from the stricken testimony. The evidence against appellant was very strong. Three days before the attack, appellant and some friends spray-painted hate-filled graffiti along the trail to Gregory's cabin. Blakely testified that appellant was angry when he discovered that Gregory had covered up some of the graffiti. Wolfe testified that when they returned to the cabin on the day of the attack, appellant laughed at the "Dave is a fag" graffiti, contradicting appellant's claim of remorse for the graffiti. Blakely also testified that appellant initiated the attack on Gregory. Blakely was appellant's friend but intervened to help Gregory, making him the only neutral witness. Gregory also testified that appellant attacked him without provocation. Gregory's wounds were severe and did not match appellant's description of

the attack. Appellant's claim that Gregory hit him with a baseball bat was not supported by the physical evidence. The doctor who examined appellant after the incident found no evidence of bruising on his body and no sign that appellant had been pepper sprayed. The doctor found that appellant had full range of motion. No baseball bat was recovered from the vicinity of Gregory's cabin.

The questions and answers about the shooting and swastikas were brief. No inflammatory details were contained in the questions. Appellant denied the shooting and the swastikas. We see no reason that the jury would be unable to follow the trial court's order striking the evidence and instructing the jury to disregard it. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1234 [assuming jury followed instruction that prosecutor's question not evidence]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843 [possible erroneous implication from prosecutor's questioning of defense witness corrected by court's admonition not to consider question as evidence]; see also *People v. Hines* (1997) 15 Cal.4th 997, 1036-1038 [possible erroneous implication from prosecutor's questions harmless under state law standard of review given overwhelming evidence of guilt].)

## 2. Continued questioning

Appellant contends that if no prosecutorial misconduct occurred, the trial court failed to properly exercise its power to control proceedings and hold an Evidence Code section 402 hearing immediately after his counsel objected to the BB gun shooting question.<sup>3</sup> He further contends that this error violated his federal and state constitutional rights to due process.

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<sup>3</sup> Appellant also appears to contend that the trial court should have held an Evidence Code section 402 hearing on the swastikas at Zydonik's house at the same time. The swastikas were not raised until after the sidebar on the shooting. Further, appellant's counsel did not object when the prosecutor asked about the swastikas. Thus, it is difficult to see how the trial court would have known to hold an Evidence Code section 402 hearing on the swastikas before the prosecutor raised the topic. In any event, for the reasons discussed in section 1, *supra*, any error was harmless.

Appellant bases his claim of error on section 1044 and Evidence Code section 402. Section 1044 provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

Evidence Code section 402 provides in pertinent part: "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury . . . ." (Evid. Code, § 402, subd. (b).)

Following appellant's trial counsel's objection, the prosecutor represented that he would be able to show the racial motivation for the shooting. We see no abuse of discretion in the trial court's decision to rely on that representation and hold the section 402 hearing later. That was certainly the most efficient way to handle the situation. Further, the jury had already heard the question at that point, and if there was any harm from the question, it had already been done.

As we discuss, *supra*, the prosecutor was unable to show that the shooting was racially motivated. Since the trial court struck the question and answer about the BB gun shooting, there was no prejudice to appellant. His constitutional rights to due process were not violated.

### 3. Battery conviction

Appellant contends, and respondent agrees, that the trial court erred in sentencing appellant for both battery with serious bodily injury and mayhem. We agree as well.

Appellant was charged with torture in count 3 and aggravated mayhem in count 4, based on the same act. The jury found appellant guilty of the mayhem charged in count 4 and of battery with seriously bodily injury in count 3 as a lesser offense of the charged crime of torture.

Battery with serious bodily injury is a necessarily included offense of aggravated mayhem. (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1168-1169; *People v. Ausbie* (2004) 123 Cal.App.4th 855, 859, overruled on other grounds by *People v. Reed*

(2006) 38 Cal.4th 1224.) Multiple convictions for the same act may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on other grounds by *People v. Reed, supra*, 38 Cal.4th 1224.) Accordingly, the conviction for battery must be reversed.

4. Prior prison terms

Respondent contends that the trial court erred in failing to either strike or impose the section 667.5 prior prison term allegation for counts 1 and 3. We agree.

Prior prison term enhancements are mandatory unless stricken. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562.) We have reversed the count 3 conviction, but the matter must be remanded for the trial court to strike or impose the enhancement for the count 1 conviction. (*People v. Campbell* (1999) 76 Cal.App.4th 305, 311.)

Disposition

The count 3 conviction for battery with great bodily injury is reversed. The matter is remanded to the trial court to either strike or impose the section 667.5 enhancement as to count 1. The judgment of conviction is affirmed in all other respects.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ARMSTRONG, Acting P. J.

We concur:

KRIEGLER, J.

WEISMAN, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.